STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 17, 2005
v	No. 252981 Wayne Circuit Court
CLINTON JOHN KUKICH, Defendant-Appellant.	LC No. 03-006842-01

Before: Griffin, P.J., and Bandstra and Hoekstra, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction for first-degree home invasion, MCL 750.110a(2)(b). Defendant was sentenced as a third-offense habitual offender, MCL 769.11, to four to forty years in prison. We affirm.

I. Factual Background

In the early morning hours of May 24, 2003, the victim was awakened by the noise of an intruder in her townhouse.[1] After she contacted 911, the police arrived and found defendant in the basement of the townhouse, crouched between the hot water heater and the furnace. Defendant was intoxicated and had vomited on the floor. After being arrested, defendant repeatedly stated something to the effect of: "I'm in the wrong house; this isn't my house." The police found three pairs of the victim's underwear in defendant's coat pocket. The screen on the victim's back window was cut and ripped, and the window was ajar.

II. Ineffective Assistance of Counsel

Defendant first argues that he was denied the effective assistance of counsel at trial. Because defendant failed to move for a new trial or for a *Ginther*[2] hearing, our review is limited to mistakes apparent on the record. *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000).

[1] The victim lived in Court-15 of the townhouse complex, and defendant lived in Court-8.

[2] *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

"Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise." *People v Solomonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004). "In order to overcome this presumption, [the] defendant must first show that counsel's performance was deficient as measured against an objective standard of reasonableness under the circumstances and according to prevailing professional norms." *Id*. "Second, [the] defendant must show that the deficiency was so prejudicial that he was deprived of a fair trial such that there is a reasonable probability that but for counsel's unprofessional errors the trial outcome would have been different." *Id*. at 663-664. "Because the defendant bears the burden of demonstrating both deficient performance and prejudice, the defendant necessarily bears the burden of establishing the factual predicate for his claim." *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001).

Defendant first argues that defense counsel was ineffective for failing to contact his former girlfriend, because he claims that she would have corroborated his assertion that the two pairs of women's underwear found during a search of his townhouse belonged to her. However, nothing in the record establishes that defense counsel did not attempt to contact defendant's former girlfriend before trial. Absent any evidence concerning defense counsel's pretrial investigation of defendant's former girlfriend, defendant has failed to establish the necessary factual predicate for his claim that defense counsel's failure to contact her constituted ineffective assistance of counsel. See *Carbin*, *supra* at 601.

Moreover, there is no error apparent from the record with respect to defense counsel's failure to call defendant's former girlfriend as a witness. Decisions regarding what evidence to present and whether to call or question witnesses are matters of trial strategy, which we will not second-guess on appeal. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). Defendant has failed to demonstrate a reasonable probability that had his former girlfriend testified, the outcome of the trial would have been different; therefore, he is not entitled to relief on this issue. *Solomonson*, *supra* at 663-664.

Defendant next argues that defense counsel was ineffective for failing to object to the admission of evidence that women's underwear was found in his townhouse, on the basis that it was inadmissible evidence of a prior bad act under MRE 404(b). However, as noted by defendant, there was no evidence that the underwear was illegally obtained; therefore, it simply does not constitute evidence of a prior crime, wrong, or act under MRE 404(b). Because defense counsel is not ineffective for failing to make a futile objection, defendant is not entitled to relief on this issue. *People v Goodin*, 257 Mich App 425, 433; 668 NW2d 392 (2003). Further, through questions to defendant and otherwise, defense counsel challenged the relevancy of the underwear found at defendant's house.

Defendant next argues that defense counsel was ineffective for failing to move to suppress statements he made to the police before being advised of his *Miranda*[3] rights. *Miranda* warnings are required to be given only when an accused is subject to custodial interrogation. *People v Coomer*, 245 Mich App 206, 219; 627 NW2d 612 (2001). After defendant was

[3] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

arrested, he voluntarily made repeated statements to the effect of: "I'm in the wrong house; this isn't my house." Because "[s]tatements made voluntarily by persons in custody do not fall within the purview of *Miranda*," defendant's statements were admissible. *People v Raper*, 222 Mich App 475, 479; 563 NW2d 709 (1997). And because defense counsel is not required to bring a meritless motion, defense counsel was not ineffective for failing to move to suppress defendant's statements. *People v Ish*, 252 Mich App 115, 118-119; 652 NW2d 257 (2002).

While defendant was in the police car, in response to defendant's repeated statements that he had been in the wrong townhouse, the police officer inquired where defendant was supposed to be. Defendant then responded that he was supposed to be at a girlfriend or former girlfriend's house. "For purposes of *Miranda*, interrogation refers to express questioning or its 'functional equivalent,'" including "'any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect.'" *People v Kowalski*, 230 Mich App 464, 479; 584 NW2d 613 (1998), quoting *Rhode Island v Innis*, 446 US 291, 300-301; 100 S Ct 1682; 64 L Ed 2d 297 (1980). However, "[a] police officer's question, prompted by a defendant's volunteered remark" "need not be suppressed at trial, even if the volunteered remark was not preceded by *Miranda* warnings." *People v O'Brien*, 113 Mich App 183, 193; 317 NW2d 570 (1982). Here, because the police officer's question was "a natural and spontaneous reaction" to defendant's repeated and volunteered statements that he was in the wrong townhouse, it was not a statement designed to elicit an incriminating response, and therefore did not constitute interrogation. *People v Leffew*, 58 Mich App 533, 537; 228 NW2d 449 (1975). Defendant's statement was admissible, and because defense counsel is not required to bring a meritless motion, defense counsel was not ineffective for failing to move to suppress defendant's statement. *Ish*, *supra* at 118-119.

Further, even if there had been a basis to suppress the testimony, it may well have been a legitimate trial strategy not to do so. While slightly inconsistent with defendant's statement that he thought he was at his own house, the statement about the girlfriend's house underscored defendant's basic theory that he was drunk and confused about which house, all of which were in the same complex, he was entering.

III. Jury Instructions

Defendant next argues that the trial court erred when it refused to provide the jury with his requested instruction on entering without breaking. However, the record reveals that the trial court did in fact give the requested instruction; therefore, defendant's assertion of error is without merit.

IV. Sentencing

Finally, defendant argues that he is entitled to resentencing because the trial court relied on inaccurate information in determining his sentence. Defendant moved to remand for resentencing in this Court; therefore, the issue is preserved for review. MCL 769.34(10). Under the sentencing guidelines act, if a minimum sentence is within the appropriate sentencing guidelines range, we must affirm the sentence and may not remand for resentencing absent an error in the scoring of the guidelines or inaccurate information relied upon in determining the sentence. *People v Kimble*, 470 Mich 305, 310-311; 684 NW2d 669 (2004); MCL 769.34(10).

At sentencing, defendant did not dispute the factual accuracy of the presentence investigation report or the accuracy of the sentencing guidelines scoring. Defendant contends that the trial court erroneously relied on inaccurate information that he was the subject of a personal protection order (PPO) for stalking that was unrelated to the instant offense in order to enhance his sentence. However, defendant has failed to produce evidence to support his assertion that the PPO was issued to protect the victim of the instant offense. Additionally, even assuming that the trial court mentioned the existence of the PPO for stalking at sentencing and was mistaken as to the circumstances surrounding the issuance of the PPO, defendant has failed to establish that the trial court relied upon or gave any weight to this information in determining his sentence. Information concerning the PPO was not included in the presentence investigation report. Further, in sentencing defendant, the trial court relied on several factors, including defendant's prior incarceration, the impact of the crime on the victim, and defendant's denial of a substance abuse problem. The trial court sentenced defendant as a third-offense habitual offender, MCL 769.11, to a minimum term of four years in prison, which is within the guidelines range of thirty to seventy-five months. Defendant's sentence fell within the appropriate sentencing guidelines range, and defendant has failed to establish that the trial court relied on information concerning the PPO in determining his sentence; therefore, we must affirm the trial court's sentence. MCL 769.34(10).

We affirm.

/s/ Richard Allen Griffin
/s/ Richard A. Bandstra
/s/ Joel P. Hoekstra